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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 537

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, the Oneida Tribe of Indians of Wisconsin, petitions for a writ of certiorari to review the judgment of the United States Court of Claims.

OPINIONS BELOW

The opinion of the Indian Claims Commission (App., *infra*, p. 17a) is reported at 12 Ind. Cl. Comm. 1. The opinion of the Court of Claims (App., p. 3a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 17, 1964. A timely motion for rehearing was denied July 8, 1964. The jurisdiction of this Court is invoked under Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s, and under 28 U.S.C. 1255(1).

THE QUESTION PRESENTED

Are the obligations of the United States to protect the property of its Indian tribes those of the Government as a whole, or can the United States avoid its responsibilities when effective measures to safeguard Indian property require authorization by the legislative branch of the Government?

TREATY AND STATUTE INVOLVED

The petitioner's reservation was established under the treaty of February 3, 1838, 7 Stat. 566, Article 2 (App. 1a). Suit was brought under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, sec. 2 (App. 1a).

STATEMENT

In this case the petitioner claimed indemnity for the loss of valuable timber by reason of the Government's neglect of a duty to safeguard the same. A judgment of dismissal entered by the Indian Claims Commission was affirmed by the Court of Claims.

The timber was the principal resource of a tribal reservation in Wisconsin established under the treaty of February 3, 1838, 7 Stat. 566, for Oneida Indians who had migrated from New York (App. 3a-4a). As tribal property it was subject to the prevailing restrictions. The United States retained the fee to the reservation while the Indians had the beneficial interest. The Commissioner of Indian Affairs supervised the reservation through the Indian Agent at Green Bay. (App. 8a). Members of the tribe were not permitted to cut timber except for their immediate use or as an incident to clearing the land for farming. The tribe was not permitted to harvest or sell the timber except with the approval of the Government (App. 4a, 6a).

Over a period of years, principally between 1854 and 1889, some members of the tribe, without authority, against the protests of chiefs who spoke for the majority, and against the remonstrances of the resident United States Indian agents, cut timber and sold it at nearby white settlements. (App. 4a, 10a-11a). Generally, the payment received was less than the value of the timber and the purchase price was often drained off into whiskey (App. 10a).

Reports of the depredations, and of the opposition thereto within the tribe, were regularly made by the resident government agents to successive Commissioners of Indian Affairs (App. 10a). The tribe itself, divided into factions, could not restrain the illegal cutting or impose sanctions. (App. 11a) One remedy suggested on behalf of the majority was that the reservation be partitioned and that tracts be allotted in severalty pro rata among the Indians so that each might thereafter safeguard his own. This was regarded by the Court of Claims as the most important proposal (App. 12a). It was in line with prevailing government policy.[1]

However, no action was taken by the Government other than the institution, in 1870, of some civil suits against purchasers from the Indians. The right of the Government to maintain such a suit was upheld

[1] *Pottawatomie Tribe* v. *U. S.*, 3 Ind. Cl. Comm. 10, 17-18. In his annual report for 1859, the Commissioner of Indian Affairs declared that the desire of the Oneidas for allotments was in conformity with firmly established policy and should be gratified (Annual report, 1859, p. 10). Allotment in severalty had been the subject of thirty-one treaties between 1854 and 1858 (10 Stat. 1038, 1043, 1048, 1053, 1069, 1074, 1078, 1082, 1093, 1122, 1125, 1132, 1143, 1159, 1165, 1172; 11 Stat. 621, 633, 663; 12 Stat. 927, 933, 939, 945, 951, 957, 963, 971, 975, 1031, 1037).

by this Court. *United States* v. *Cook*, 19 Wall. 591. Suits against purchasers did not stop the illegal timber cutting, which continued until about 1889, when the reservation lands were distributed in severalty pursuant to legislation of general applicability, the General Allotment Act of 1887, 24 Stat. 388. (App. 13a) By that time the reservation had been depleted of most of its timber. The loss to the tribe was substantial (App. 10a).

On these facts the Indian Claims Commission held that the Government had no special applicable duty and dismissed the petitioner's suit. (App. 17a-32a). On appeal the Court of Claims held that the United States did have a duty to protect the tribal timber arising out of its special relationship to Indian tribes, and that the fact that the depredators were members of the tribe did not excuse the United States from shouldering responsibility (App. 8a, 14a). However, the Court was of the opinion that effective remedial action required special legislation, and none was adopted (App. 15a). The Court held that the United States should not be charged with a breach of duty where effective discharge of the duty required authorization by Congress; that the legislative process "cannot ordinarily be appraised by the fiduciary standard"; that Congress should not be required "to reach out and deal with particular problems" (App. 15a-16a).

REASONS FOR GRANTING THE WRIT

Petitioner sought relief on the ground that the United States had a duty to act but failed to take appropriate action. The Court of Claims agreed that the Government had such a duty but ruled that it fulfilled its duty by measures which were inadequate and

inneffectual, because the executive branch had no authority to take more effective measures and legislative action was not part of the Government's obligation.

1.

There is more at stake in this case than damages for a century-old wrong. The question at issue is bound up with a continuing relationship between the Government and perhaps several hundred thousand tribal Indians still to some degree in wardship status. Involved is the question whether Indian tribes are subject to the will of a Congress which may exercise power without responsibility, and to the supervision of officials who have responsibility without power.

2.

The ruling of the Court of Claims is inconsistent with principles established by a long line of this Court's decisions. The ruling implies that the executive branch, rather than the Government of the United States as an entity, is the guardian over Indian tribes. The responsibilities of the guardian are equated by the Court with the limited means and functions of particular government agencies. But it is the federal government, not the president or subordinate officials, which is the guardian. *Morrison* v. *Work*, 266 U.S. 481, 485.

In the exercise of the guardian's functions Congress, not the executive, is the dominant branch of the Government. It is Congress which exercises control and management of tribal property under what is sometimes termed its "plenary power". *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306; *Lone Wolf* v. *Hitch-*

cock, 187 U.S. 553, 564-565; *Perrin* v. *United States,* 232 U.S. 478, 486; *United States* v. *McGowan,* 302 U.S. 535, 539.

The restrictions on land alienation, which are at the heart of the guardian-ward relationship, were imposed and may be lifted or modified only by Congress. *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 316; *United States* v. *Nice,* 241 U.S. 591, 598; *United States* v. *Hellard,* 322 U.S. 363, 367.

While the Court of Claims located the power to act and the duty to act in different bodies, this Court has consistently paired the power with the duty to protect Indian lands. *United States* v. *Kagama,* 118 U.S. 375, 383-384; *United States* v. *Rickert,* 188 U.S. 432, 442-443; *Heckman* v. *United States,* 224 U.S. 413, 438-439; *United States* v. *Sandoval,* 231 U.S. 28, 45-46; *La Motte* v. *United States,* 254 U.S. 570, 575; *United States* v. *Shoshone Tribe,* 304 U.S. 111, 118.

Similarly, while the Court of Claims concluded that it is not for Congress to deal with particular Indian problems, Congress has elected to do so from the beginning. As pointed out in the official and authoritative work on Indian law, "... tribal Indians have been subject throughout our history to ... special or local laws enacted by Congress for their governance ..." Federal Indian Law (Washington, 1958) p. 1.

3.

The question has not been passed on by this Court. Before passage of the Indian Claims Commission Act, suits against the United States were brought by Indian Tribes only under special jurisdictional acts with limited scope. Only one suit brought under the Indian

Claims Commission Act has been before this Court and in that instance the decision of the Court of Claims was affirmed without opinion by an equally divided court. *Creek Nation* v. *United States*, 370 U.S. 157.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

Treaty of February 3, 1838

7 Stat. 566

ARTICLES OF A TREATY,

Made at the City of Washington between Carey A. Harris, thereto specially directed by the President of the United States and the First Christian and Orchard parties of the Oneida Indians residing at Green Bay, by their chiefs and representatives.

* * * * *

ART. 2. From the foregoing cession there shall be reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.

* * * * *

Indian Claims Commission Act

60 Stat. 1049-1050
25 U.S.C. 70

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in

tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 1-63

(Decided April 17, 1964)

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN
v. THE UNITED STATES

Louis L. Rochmes for appellant. *Ely M. Aaron, Aaron, Aaron, Schimberg & Hess* and *Marvin S. Chapman* of counsel.

Ralph A. Barney, with whom was *Assistant Attorney General Ramsey Clark*, for appellee. *Howard G. Campbell* was on the brief.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

Opinion

DAVIS, *Judge*, delivered the opinion of the court:

In the first years of the 1830's, a large number of Oneida Indians, encouraged by the Federal Government, moved from upstate New York to live on lands in Wisconsin acquired for them from the Menominees. By the Treaty of February 3, 1838, 7 Stat. 566, these groups (known as the First Christian and Orchard parties of the Oneidas) ceded to the United States all these lands, except for a reservation (of about 65,000 acres) "in the vicinity of Green Bay" "to be held as other Indian lands are held." This reservation (Royce designates it as Area 158) became tribal property and remained so until the lands were allotted to the individual members of the Tribe shortly after the passage of the

General Allotment Act of February 8, 1887, 24 Stat. 388. In 1838 this area was covered by a dense growth of pine and hardwood timber. Portions of the spread were cut down to clear farms for many of the Oneidas, but large tracts within the reserved land remained virgin forest.

From the establishment of the reservation in 1838, continuing until the allotments in 1889, there was misuse by certain Oneidas of these forested areas. Timber was cut, not only to create farms, but chiefly to sell, and the logs were then sold to mills and settlers on the adjoining non-reservation lands. This continuing cutting-and-selling by individual members of the Tribe gravely depleted the timber resources of the reservation. The Tribe as a whole suffered substantial losses, though the depredators gained whiskey or money for themselves.

Appellant made claim, under Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a, for the value of this timber and the amount of the loss. Docket No. 159 of the Indian Claims Commission. The petition made demands under subsections (1), (2), and (5) of Section 2.[1] The gist of the claims was that the United States, although obligated to protect the Tribe's timber resources, did not take adequate steps to end the lawless timber-cutting. After a hearing at which both sides introduced only documentary evidence, the Commission determined that the Tribe was not entitled to recover and denied it any relief. 12 Ind. Cl. Comm. 1 (Dec. 6, 1962). The Commission held that the timber was tribal property and that the Tribe had suffered a loss, but that in the circumstances the United States was

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[1] (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * * and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

not liable for the loss. On this appeal the appellant attacks the holding against liability, while the appellee reasserts its special defense (rejected below) that the Tribe had no rights in the cut timber and therefore could suffer no tribal loss.

I

We agree with the Commission that the Oneida Tribe had a sufficient interest in the timber on which to base a claim under the Indian Claims Commission Act. The normal rule is that stands of wood on a tribal reservation belong to the tribe. *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116, 117, 118 (1938); *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 122-23 (1938); *Federal Indian Law* (1958), p. 657. The Government sees a difference in this case because the 1838 Treaty provided that the reservation land was "to be held as other Indian lands are held." 7 Stat. 566. This is said to mean that the Indians had aboriginal title, not recognized title; and aboriginal title, it is then argued, supports no claim whatever, in law or equity, against the United States (see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-79, 281 (1955)). But in applying the comparable provision of the Menominee Treaty of 1854, 10 Stat. 1064, 1065—"to be held as Indian lands are held"—this court considered that the treaty gave the tribe a sufficient interest in the reservation's timber to bring suit for a loss through the Government's negligence. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 22, 24, 38 (1944). The treaty in *Klamath & Moadoc Tribes*, *supra*, set aside an area for the Indians' residence to be "held and regarded as an Indian reservation." 16 Stat. 707, 708 (1864). We think that the Oneidas' 1838 Treaty, like the Menominee's 1854 Treaty, meant no less than the Klamath treaty—*i.e.*, "held and regarded as an Indian reservation"—in referring to the way "Indian lands are held." This phrase should be read, not as pointing to aboriginal title *simpliciter*, but as equating the Oneidas'

tract with that of other Indian *reservations*. In that way Congress recognized the Oneidas' title to the reservation and its resources.[2] The Tribe's petition, therefore, properly states a cause of action under Section 2 (1) and (2) of the Indian Claims Commission Act.

This conclusion does not contradict the holding in *United States* v. *Cook*, 19 Wall. 591 (1874), in which the Supreme Court decided that the United States could bring replevin against a purchaser of logs cut from the Oneida Reservation. In answering the contention that the Indians had full authority to cut and sell the timber, the Supreme Court used somewhat broad language contrasting the Government's fee title with the Tribe's mere "right of occupancy." But all that the case held was that the Indians could not sell the timber without governmenal authority and that the United States had a sufficient interest to bring a replevin action. The same relatively narrow foundation lies at the bottom of *Wooden-Ware Co.* v. *United States*, 106 U.S. 432 (1882) (another case involving logs unlawfully cut from the Oneida Reservation). The Supreme Court has explained *Cook* in this fashion. In *United States* v. *Shoshone Tribe, supra*, 304 U.S. at 118, the Court said:

> *United States* v. *Cook, supra*, gives no support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's

[2] *Tee-Hit-Ton Indians* v. *United States, supra*, did not involve a treaty reservation like appellant's, and the Court held that Congress had never recognized the Indians' title by legislation or otherwise.

right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.[3]

Were one, nevertheless, to accept at face value appellee's assumption that the Oneidas held no more than aboriginal Indian title, we still could not find their claims beyond the scope of the Indian Claims Commission Act. Without that legislation, a justiciable claim might not be stated. See *Tee-Hit-Ton Indians* v. *United States, supra.* But the Act has authorized recoveries on the basis of original Indian title (*Otoe & Missouria Tribe* v. *United States,* 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied,* 350 U.S. 848 (1955)), and there is no reason why a claim of the sort presented here could not come under the "fair and honorable dealings" provision (section 2(5))—at the minimum. If the Federal Government failed to treat fairly and honorably, in the circumstances, with the reservation timber, the defendant would be liable under the Act even though no conventional claim in law or equity was presented.

II

The more difficult problem is whether the Tribe has made out a case under its petition. The defendant urges that the 1838 Treaty did not create any guardian-ward or fiduciary-beneficiary relationship between the Federal Government and the Oneidas, and therefore that the Government had no responsibility to prevent wastage of the timber. We do not discuss the question of whether, and to what extent, the United States has had, in general, the technical status of guardian or fiduciary towards its Indian dependents. *Cf. Gila River Pima-Maricopa Indian Community* v. *United States,* 135 Ct. Cl. 180, 187-89, 140 F. Supp. 776, 779-81 (1956); *Sioux Tribe* v. *United States,*

[3] This court took the same position when the *Shoshone* case was before it. 85 Ct. Cl. 331, 365 (1937).

146 F. Supp. 229, 237-38 (Ct. Cl. 1956).[4] In the Oneidas' case, we are satisfied that—at least for the purposes of the Indian Claims Commission Act—the United States could not stand on the other side of the road and avert its face from the continuing loss of the timber. The Tribe was a dependent group which had been encouraged by federal officials to leave its home in New York and migrate to Wisconsin. Land was procured for it from the Menominees (7 Stat. 343, 7 Stat. 407), and in 1838 it ceded that area to the Government, exempting the reservation. The Government retained the fee to the reservation and the Indians had the beneficial interest. The Commissioner of Indian Affairs maintained supervision over the tract and the Indian Agent at Green Bay was entrusted with that duty. There was a continued concern, on the part of the Indian Office, with the life and livelihood of the Tribe. In similar circumstances, when a special jurisdictional act allowing the Menominees to sue for lost timber provided that this court should consider the United States a fiduciary, the court said that the statute added little to the settled doctrine that the Federal Government, as regards its dealings with the property of the Indians, is a trustee. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19; *Menominee Tribe* v. *United States*, 101 Ct. Cl. 22, 40 (1944). We think, similarly, that in this suit under the Indian Claims Commission Act we must hold that the United States had an obligation to the Oneidas greater than that of a non-participating bystander, or of a sovereign toward its ordinary citizens, or of a landowner toward his tenant. The relationship was special and from it there stemmed a special responsibility.

It is unimportant, in this case, to characterize that obligation precisely. Whether the responsibility be termed that

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[4] The court's decision of November 7, 1956, in *Sioux Tribe* was not officially reported. By order of the court, dated November 5, 1958, the appellant's motions for a new trial and to vacate the judgment of Nov. 7, 1956, were granted and the case was remanded to the Indian Claims Commission for further proceedings.

of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances, to save the timber?[5] That is the standard.

III

In appraising the defendant's responsibility, we have the advantage of substantial agreement upon the basic facts. The record is entirely documentary and there are no issues of testimonial credibility. The Commission's findings are very general, and except for certain conclusory sentences both parties are prepared to accept them in the main. The differences argued to us are primarily differences in judgment, not in historical fact.

From the findings as supplemented by the contemporaneous papers, we gather that timber-cutting took a large role in the Oneidas' life even before the reservation was formally created. In 1836, some of the chiefs of the First Christian Party signed an agreement with another chief, Daniel Bread, leasing him land on which to construct a dam and sawmill. Any Oneida had a right to cut logs and draw them to this mill; payment for the milling was to be in kind (a portion of the boards fabricated by the mill). Presumably the mill was to be used only for timber properly cut to clear lands for farms, and for conservatory or agricultural

[5] The Commission below ruled that the appellant "has not established a guardian-ward or fiduciary relationship." If the opinion meant by this to hold that the defendant had no special relationship to the Tribe's property, the Commission erred. The opinion then seems to go on to say that, in any event, there was no default by the Government.

purposes, but it seems probable that it was also utilized, as time went on, by Indians cutting logs purely for purposes of sale.[6] At any rate, such improper cutting-and-selling by individual members of the Tribe began early and continued for many years. The Commission found that it ended about 1870—after the United States had successfully sued merchants who bought such lumber from the Indians—but the documentary record proves that serious complaints about illegal timber-cutting continued until about the time (approximately 1889) the reservation lands were allotted in severalty to the individual tribal members under the General Allotment Act of 1887, 24 Stat. 388.[7] Various members of the Tribe seemed to feel that it was easier to obtain a livelihood by chopping and selling the trees on the parts of the reservation not used for farming than by cultivating the soil. Generally, the payment received from outsiders was less than the true value of the timber, and the purchase price was often drained off into whiskey. Nevertheless, the cutting went on and resulted in loss of a major part of the wooded resources of the reservation.

This depredation by members of the Tribe was known to the successive Indian Agents who reported the facts to the various Commissioners of Indian Affairs over the years.[8] So far as the records show, these reports by Agents appear to have begun in 1854 and continued

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[6] Some years after he built his sawmill, Daniel Bread assigned his agreement to Foster, a non-Indian. Foster enlarged the mill and dam, and it is clear that in Foster's time a large part of the mill's work was done on timber illegally cut by Oneida depredators.

[7] The record contains an Interior Department communication, dated July 26, 1887, referring to the cutting and sale by Oneida Indians of timber on their reservation. A letter of January 10, 1878, refers to "the continuing violation in the cutting of timber" on Indian reservations, including the Oneidas'.

[8] There is not the slightest suggestion that the Indian Agents (or other officials of the Federal Government) participated in, or gained from, the cutting-and-selling.

through the 1880's. The reports show that there was a continuous serious conflict within the Tribe over the timber-cutting. Probably a majority of the chiefs and the members were opposed to this activity, but a significant number of chiefs and a large portion of the Tribe encouraged, approved, or condoned the practice. Those who were opposed to the waste desired that some action be taken to put an end to it, while the cutting party resisted all such efforts, particularly the suggestions which would have been effective. It is clear that this internal dissension lasted for most of the period, and that those who favored the spoliation were strong and persistent. In the report of the Supreme Court case of *United States* v. *Cook, supra,* 19 Wall. 591, 592 (1874), involving cutting on the Oneida lands, it is said that "evidence was offered tending to prove that timber on the reservation had been cut and sold by the Indians of the tribe continually since 1838, *with the tacit consent of the officers of the tribe.*" (Emphasis added.) From the present record it appears that this consent was not given by all or a majority of the chiefs, but it is also plain that several of the significant tribal officers did encourage and support the cutting.

Several proposals were put forth, through the decades from the late 1850's to the 1880's, to cure the deteriorating situation. One was for the resident agents to discourage and prohibit the improvident cutting. This was done repeatedly. The Indian Office issued such instructions again and again; the agents expostulated and remonstrated. The results were poor—the cutting continued. Another theoretical possibility was the exertion of tribal authority and the imposition of tribal sanctions. In fact, this approach could not be utilized because of the conflicting positions of the chiefs and the erosion of the tribal system of punishment and sanctions; tribal criminal justice seems to have fallen into almost complete disuse and the moral influence of those chiefs who wished to stop the cutting was slight.

Still another suggestion was that the criminal law of Wisconsin be extended to the Reservation, or that the Federal Government pass legislation making it an offense to chop the timber or to receive it from the Indians. Both of these solutions required Congressional action, and both were tied to the larger and much mooted problem of the extent to which the Federal Government should create or sanction a non-Indian criminal code for Indian reservations. It was not until 1888 that Congress made it a federal criminal offense to cut timber on Indian lands. Act of June 4, 1888, 25 Stat. 166.

The most important proposal was that the land of the reservation be allotted to the individual members who could then fence and look after their own tracts. But this suggestion, too, required a federal statute, and was likewise connected with the general problem of allotments of Indian land throughout the country. For the Oneidas there was an added difficulty. The cutting party forcefully opposed the allotment of the reservation. There are documents in the record showing that on this subject the chiefs of the Tribe were very closely divided, and that the adverse group threatened or intimated violence if the proposal were carried through against its wishes. The same contentiousness, with threats of violence, surrounded the alternate proposal that all or part of the forested areas be sold to the Federal Government or to another tribe.[9]

[9] In 1868, the Indian Agent reported that "upon the subject of the treaty proposed to them [selling land to the United States for other Indians], seven of their Chiefs representing, it is believed, a majority of the whole Tribe, are in favor of entering into the arrangement, while the remaining six bitterly denounced the proposition and oppose the consummation. The minority even go so far as to threaten violence in case the friendly Chiefs make a treaty." In 1869, the Agent reported "that the party opposed to allotment is composed of a large number of young men of the tribe calling themselves *Warriors*. That they resist the sale or survey and subdivision of the lands because it would interfere to prevent the wholesale cutting and sale of the pine timber on the Reserve,

Lastly, there was the possibility of suits against the settlers and merchants who bought timber from the Indians. It was unclear for many years whether such an action could be brought by the United States. In some quarters it was believed the timber belonged to the Indians and the United States had no interest. This was the ruling of the circuit judge when the Federal Government, about 1868, sued Foster who had acquired and enlarged Daniel Bread's mill (see footnote 6, *supra*). The Government lost the case. *United States* v. *Foster*, 25 Fed. Cas. 1171, Case No. 15,141 (C.C.E.D. Wis. 1870). In 1874, the Supreme Court held the opposite in *United States* v. *Cook*, *supra*. Several other cases of this type were brought and won by the United States. Even these decisions, however, did not end the depredations. As we have already indicated, the illegal cutting-and-selling continued well into the 1880's, until individual allotments were made.

This is the history which must be assessed. The Indian Claims Commission seems to have thought that the United States was duly diligent, but we cannot accord the Commission's view of the facts the usual weight because that

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as each would then be restricted to the particular lot or parcel which would fall to his share in the allotment. * * * They disregard all instructions and insist on their right to cut indiscriminately on any part of it and remove and dispose of the timber in defiance of all attempts on my part to put an end to their traffic." (Emphasis in the original.) The same report recites that, after proceedings were brought against Cook (a mill owner who procured logs from the cutting Indians), "These proceedings interfering, in a measure, with the disposal of their logs, a Council was called (and I am credibly informed) at which it was proposed to depose all the old chiefs who did not coincide with the views of the *Warriors* and threats were made that they would get rid of them by foul means if necessary to prevent further interference with their lawless proceedings. Against Daniel Bread, Head Chief, particularly they expressed most bitter denunciation and threats of violence because he had taken the responsibility without their consent of making the complaint upon which Cook was arrested." (Emphasis in the original.) Still other reports reflect threats and potential violence by the cutting party.

portion of its opinion is both too summary and too closely entwined with its apparent position that the United States did not have any special responsibility toward preservation of the tribal forest (see footnote 5, *supra*). We agree, however, on our own appraisal of the history, that the defendant did the minimum (at the least) it was called upon to do, in the circumstances, to save the timber.[10]

For the Federal Government the most difficult aspect of the problem was that the depredators were members of the Tribe. This, in itself, would not excuse the United States from shouldering all responsibility. But the sharp division within the Tribe did make a difference in the action the defendant could be expected to take. If the cutters were few or weak or opposed by the united strength of the group, the defendant might well be held to greater efforts. As we have pointed out, that was not the situation on the Oneida Reservation. The unlawful cutting had its seed in the Bread mill sanctioned by the Tribe itself—a project which, though it may have been started with the best of intentions, easily lent itself to misuse. Throughout the period, the party upholding the cutting had the support of a substantial segment of the Tribe and of the chiefs. That party was strong and persistent; at times it may even have been close to a majority; it muttered about the violence which would occur if its activities were stopped; and the possibility of open internal conflict was far from slight. Tribal authority proved ineffective to control the dissidents. The Indian Agents unsuccessfully tried persuasion, expostulation, and prohibition. There were no operative federal criminal sanctions.

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[10] We do not remand to the Commission to make the evaluation under the proper legal standard (*cf. Spokane Tribe* v. *United States*, Ct. Cl., Appeal No. 5-62, decided Oct 11, 1963, slip op., pp. 11-12) because (a) the Commission may already have made that appraisal in summary form, (b) the record is entirely documentary and neither party suggests new evidence, (c) in large part we believe the conclusion we reach to be compelled by the record, and (d) there are no further proceedings before the Commission on any aspect of the case.

All that remained for the Executive Branch to do, within the powers then vested in it, was to use the military or to institute suits against the purchasers of the logs. We certainly cannot say that the Federal Government breached its duty by failing to call out the troops. The close division in the Tribe, and the strong feeling of the adverse group, would counsel against that drastic remedy. There were, besides, other calls upon federal soldiers during the 1860's and the first half of the 1870's—the period of the Civil War and Reconstruction. The need for surveillance on the reservation would be constant and, undoubtedly, adequate troops could not be spared. As for court actions against the purchasers, they might perhaps have been brought some years earlier, but three factors lead us to find no breach of duty in the delay. First was the ever-present contention among the Oneidas, which would prompt caution.[11] Second was the uncertainty (to which we have referred earlier) as to the right of the Federal Government to file such suits. Third, and perhaps most significant, is the fact that the cutting was not stopped by the successful suits which were ultimately brought; this type of litigation did not prove in actuality to be an effective remedy.

The remaining weapons of the Federal Government were all legislative. Congress might have earlier provided criminal sanctions against the cutting or it might earlier have authorized the allotment of the reservation. This need for Congressional legislation is a prime element in weighing the defendant's duty. Where the obligation of the United States is akin to that of a fiduciary, we would normally be slow to charge the defendant with a breach if the failure were a failure by Congress to enact new substantive legislation. The legislative process is a function of so many varying components and interests—general and particular—that it cannot ordinarily be appraised by

[11] As indicated in footnote 9, *supra*, the suit against Cook brought, in its wake, threats of violence and recrimination against the part of the Tribe supporting the litigation.

the measure of the fiduciary standard. Just as the United States as contractor is not responsible for the acts of the United States as sovereign (*Horowitz* v. *United States*, 267 U.S. 458 (1925)), so the United States as guardian, fiduciary, custodian, or protector is not easily to be held for the refusal or failure of Congress to pass new statutes. The concerns of Congress are too many-sided to permit its being bound, at peril of the defendant's liability, to reach out and deal with particular problems. To these general considerations the present case adds its own special support. The issue of a criminal code for Indian reservations was general, not limited to the Oneidas, and it was controversial; the same was true of the allotment of Indian lands. In the nature of legislative deliberation, enactments of this type might well require a long period of gestation, especially in an era when the minds of the country and of Congress were centered on other pressing themes. The question of allotment, in particular, had widespread ramifications far beyond the limited difficulty of the Oneidas with their timber. The wisdom of dividing up the tribal lands is still debated some seventy-five years after the General Allotment Act.

The result is that we cannot say that the defendant did less than it was required to do in the situation facing it on the Oneida Reservation. What the Government did was ineffective, but in view of all the circumstances it was not compelled to go further. The Tribe permitted, through weakness and division, the wasting by its own members of the tribal assets; intervention by the Indian Agents and litigation against purchasers of the timber failed to end the practice; it could be stopped only by a more forceful or more far-reaching type of intervention which the United States was not obliged to invoke.

The appellant has failed to make its case. The decision of the Indian Claims Commission must stand.

Affirmed.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 159

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Defendant,*

Decided: December 6, 1962

Appearances:

ELY M. AARON with whom were
MARVIN S. CHAPMAN and LOUIS
L. ROCHMES, *Attorneys for Petitioners.*

JAMES J. MANOGUE with whom was
Mr. Assistant Attorney General
RAMSEY CLARK, *Attorneys for Defendant.*

Opinion of the Commission

Watkins, Chief Commissioner, delivered the opinion of the Commission.

The case is now before the Commission for a determination as to:

I. Whether or not timber on the Oneida Reservation was tribal property owned by the petitioner herein.

II. Did the removal of growing timber, without benefit to the tribe, constitute a tribal loss. Did the defendant have a fiduciary duty to act to protect the petitioner under Sec. 2(1) and Sec. 2(2) of the Indian Claims Commission Act and did the defendant breach the alleged fiduciary duty.

III. Is the defendant liable under the so-called fair and honorable dealings section (Section 5) of the above cited Act, entitled Public Law 726, 79th Congress.

To answer the foregoing queries it seems first necessary to briefly summarize the facts by reason of which facts this action is brought.

The Oneida Tribe of Indians of Wisconsin, the petitioner herein, is a recognized tribe of Indians with a constitution and by-laws approved by the Secretary of the Interior (Dkt. 75, 5 Ind. Cl. Comm. 560). As such a recognized tribe it has the capacity to bring and maintain this action.

By a treaty dated February 3, 1838, (7 Stat. 566) a reservation was set aside for the Oneida Indians in Wisconsin. This reservation was in the southerly portion of Royce Area 158 Wisconsin, Map No. 2, said land being located in northern Wisconsin. This tract, reference No. 158, was used by Royce in his Wisconsin maps of the Indian land cessions outlined in the 8th Annual Report of the Bureau of American Ethnology for 1896-1897.

Said Indians were referred to in the treaty as the First Christian and Orchard Parties. The reservation comprised approximately 65,000 acres. Article VI of the treaty provided that the treaty was to be binding when ratified by the United States Senate. On May 12, 1838, the Senate by resolution did ratify and confirm said treaty.

In 1838 the lands contained in the reservation were virtually all covered with a dense growth of pine and hardwood timber (Letter of Indian Agent Davis to Commander Cole, dated September 27, 1862; and a letter from Indian Agent Davis to Commissioner Cooly dated September 25, 1865; Annual Report of Commissioner of Indian Affairs, 1862, Doc. No. 68, pp. 328-334 and Annual Report of Commissioner of Indian Affairs, 1865, Docket No. 173, pp. 619-623.)

The Oneida property was tribal property (Pet. Exs. 15, 17, 18; Def. Ex. 55) and remained so until the lands were allotted or distributed in severalty among members of the

tribe on or about 1889. Such distribution was pursuant to the General Allotment Act of February 8, 1887 (24 Stat. 388).

After the treaty of February 3, 1838, timber was cut and sold from lands on the tribal reservation by some members of the tribe, as it had been done prior to the treaty. The majority of said cutting and selling continued from some time before the date of the treaty to approximately 1879. Both petitioner and defendant agree that said cutting and selling did occur (Pet. Exs. 11, 12, 14, 21, and 22; Def. Exs. 55, 64). Some of the Indian chiefs did object to the said cutting and protested to various Indian Agents of the Government. These protests were presented over a period of years (Pet. Exs. 3, 5, 9, 11, 18, 20; Def. Ex. 11). The cutting and selling of timber on the reservation was virtually halted by a series of legal actions brought by the United States Government, one of which was *United States* v. *Cook*, 86 U.S., p. 591. This decision held that the United States could maintain a replevin action against one George Cook for logs cut by individual Oneida Indians on the subject lands and sold to the defendant, Cook. The plaintiff was awarded a cash verdict and judgment was entered and after execution the amount of the judgment was paid into the United States Treasury.

The government in 1868 had also taken action to halt the unauthorized sale of tribal timber by means of a letter from the Commissioner of Indian Affairs to the United States agent for the Oneida Indians in which the Commissioner informed the agent that it was the intent of the Department of Interior to put a stop to the unauthorized cutting from the tribal reservation and that any person or persons hereafter committing such trespass would be brought to justice. (Def. Ex. 15).

However, as noted above, prior to 1870 the great bulk of timber on the reservation lands had already been cut

and removed. This fact is not in dispute between the parties in this action.

With the summary of the above facts the Commission now proceeds to the following determination:

Ownership of the Timber on the Lands Contained in the Treaty of February 3, 1838

The petitioner contends that the words of reservation contained in the Treaty of February 3, 1838, "to be held as other Indian lands are held" created a tribal reservation, and petitioner further contends that timber growing on a tribal reservation belongs to the tribe. In support of this theory petitioner cites *United States* v. *Shoshone Tribe*, 304 U.S. 111; and *United States* v. *Klamath and Modoc Tribes*, 304 U.S. 119.

Defendant contends in answer to this argument that there is a difference between the nature of the Oneida Reservation herein and the Shoshone and Klamath reservations. In support of this theory the defendant cites among other cases *Tee-hit-ton Indians* v. *United States*, 348 U.S. 272. Defendant contends under this theory that as in the *Tee-hit-ton* case the land involved herein was not treaty land and that in the present case the land involved was not a part of the so-called aboriginal title of the Oneida tribe but was land purchased from Menominee Indians in 1821 and 1822 and that the Menominee conveyed no more to the petitioner than the Menominee had received from the government. However, the defendant recognizes that some rights were granted by the treaty of 1838 to the petitioner herein but argues that these were not permanent rights and quotes the decision in the *Tee-hit-ton* case referred to above to sustain his position. It is necessary to mention that the *Tee-hit-ton* case involved a treaty that was never ratified by Congressional action.

The Commission is of the opinion that it is now well-settled law that where the *Congress by treaty* has declared

that thereafter specific Indians were to hold lands permanently, compensation must be paid for subsequent taking. *United States* v. *Creek Nation*, 259 U.S. 103, 109-110; *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497; *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-376; *United States* v. *Klamath Indians*, 304 U.S. 119; *Sioux Tribe* v. *United States*, 316 U.S. 317, 326. As was stated in the *Tee-hit-ton* case there is no particular form for congressional recognition of Indian rights of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101. The Shoshone case and the Klamath Indian case cited immediately above held that the words of the reservation in each of the treaties involved created a tribal reservation and that timber growing on the tribal lands reserved belonged to the respective tribes.

Defendant also contends that the Supreme Court has twice held that timber cut from the Oneida Reservation by individual Oneida Indians is the property of the United States and that these two decisions are therefore *stare decisis* and should be decisive in this case. The defendant does not set forth the two cases he refers to, but it obviously does have reference to *United States* v. *Cook*, and *Wooden Ware Company* v. *United States*. These two cases are referred to in Finding of Fact No. 7 herein.

The Commission is of the opinion that the two cases set forth above should not be held to be *stare decisis* on the question of the scope of Indian title to the timber in view of the language in the case of *Shoshone Indians* v. *United States*, 304 U.S. 111, which stated:

> United States v. Cook . . . gives no support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of

> Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.

The Commission is of the opinion that the language of the treaty involved herein, which treaty contained a clause stating that the land was to be held as other Indian lands are held and which treaty was ratified by congressional action indicated an intention by Congress to grant to the petitioner a permanent right in the lands involved herein and thus the instant case is distinguished from the *United States* v. *Cook* and *United States* v. *Wooden Ware*, cases relied upon by the defendant and therefore the timber on the reservation land herein was tribal property owned by the petitioner herein.

Was There a Tribal Loss?

There is no question that the selling and removal of the growing timber was a tribal loss with the benefits from the sale of said timber being realized by white purchasers and individual Indians of the petitioning tribe (Pet. Exs. 1-4; 7-15; 17 and 19; 20-24 and 26).

I. Was There a Fiduciary Relationship? If so, Was It Breached?

II. Were the Defendant's Dealings With the Petitioner Less Than Fair and Honorable?

Petitioner contends that the land involved herein was tribal property from the date of the treaty until its allotment to individual Indians occurring in the period from 1889 to 1894. The Commission having upheld petitioner's

position on this point, the question arises, did the defendant by any wrongful acts or omissions to act breach its fiduciary duty to the petitioner (if any such duty existed) under the treaty of 1838 with the petitioner, or under the Constitution and laws of the United States, and the further question arises, was there damage to the petitioner, for which recovery is authorized by petitioner under Section 2(1) and Section 2(2) of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

The petitioner in its brief states that the defendant had knowledge of the timber cutting. Petitioner's point is well established both by evidence submitted by petitioner and defendant. (Pet. Exs. 1-4, 7, 11-15, 17, 18, 21-24; Def. Exs. 14, 18, 55)

The petitioner alleges that this cutting caused a tribal loss. This position, as noted above, has been sustained by the Commission herein.

The petitioner then alleges that the defendant had a duty to act to halt the alleged unauthorized cutting because of the alleged guardian relationship it had assumed over the petitioner herein, and that the government's failure to so act resulted in substantial losses to the petitioner, for which the defendant should respond in damages.

There is no argument between the parties as to who actually did the cutting and removal of said timber. Said cutting was done by individual Indians of the petitioner tribe, sometimes under written contract with white individuals (Def. Exs. 26, 29, 30, 57, 67, 69, and 73), and sometimes under informal agreements to sell the timber at nearby white settlements (Pet. Exs. 1-4, 7, 11-15). There is no allegation by petitioner anywhere in the pleadings or in the evidence submitted herein that the defendant, through its agents, aided or abetted in said cutting and removal. In fact, quite the opposite was true. The various agents remonstrated with the individual Indians and with any of the tribal chiefs that would listen, stating in effect that the

cutting of the timber would work to the ultimate detriment of the tribe. Some of the Indians were in favor of individual allotments to help stop the cutting (Def. Exs. 5, 8, 11; Pet. Exs. 11 and 55). However, some of the Indians and tribal chiefs refused to heed the agent's warnings and were in favor of continued cutting of timber and against land allotments (Def. Ex. 64). A review of the evidence submitted including all exhibits introduced by both petitioner and defendant indicates that the first written reports on the cutting were dated in 1854 and continued quite regularly until 1879. The evidence of cutting and removal from the period of 1838, the date of the treaty, until 1854 is quite scanty with the exception of the location of the mill on Duck Creek. The existence of said mill is set forth in Finding of Fact No. 8 herein.

It should finally be set out that petitioner is not advancing any argument or complaint that the terms of the treaty of 1838, between petitioner and defendant, were not fair or equitable. Furthermore, petitioner has raised no question as to the fairness or adequacy of the consideration paid to the petitioner by the defendant, nor does petitioner allege that there are any specific words of a fiduciary or guardianship nature contained in the treaty, nor does petitioner contend that he misunderstood the terms of the treaty. In short, petitioner apparently accepts the treaty as it was consummated. As stated above, petitioners compiaint lies in alleged wrongful acts and/or omissions to act by defendant that ocurred after the date of the treaty. Said acts and/or omissions to act allegedly causing damage to the petitioner by reason of a breach of defendant's fiduciary duty to petitioner as its guardian.

An examination of cases involving the alleged fiduciary relationship between the government and the various Indian tribes is helpful in defining and setting out the government's duty to the various Indian tribes under the guardian-ward theory proposed by petitioner in this case.

Petitioner cites four cases in support of its theory in the instant case that the government had a duty to act under its duty as a guardian to the petitioner.

The first case cited is *United States* v. *Boyd et al.*, 83 Fed. 547. In that case the court held that the Indians involved (Cherokees) were wards of the nation and that the Indians themselves had recognized this status from 1848 to the time of the contract. Further, in this case the decision of the court turned upon the fact of whether or not the Secretary of the Interior had power to refuse to sanction a contract for sale of timber under terms of a treaty and deed. The Court held that the Secretary did have such power and this fact was held to be conclusive. There is nothing akin to this point in the present case. Also, in the present case there is nothing, as above noted, presented in the evidence or in the treaty to show that either party recognized a guardian-ward relationship.

The petitioner then cites the cases of the *United States* v. *Kempf*, 171 Fed. 1021, and *United States* v. *Konkapot*, 43 Fed. 64. Both of these cases concerned prosecution of individuals who had violated specific statutes against unauthorized cutting of Indian reservation timber. In both cases it was held that the government had jurisdiction to so prosecute. However, neither case turned on the issue of a guardian-ward, or other type of fiduciary relationship, but rather upon the violation of the specific statutes involved.

The last case quoted by the petitioner was that of *St. Marie et al.* v. *United States*, 24 Fed. Sup. 237. This case was involved with the question of land allotments and the Secretary of the Interior's power or duty to make such allotments to individual Indians under a specific Congressional Act. The quotation in this case, cited by the petitioner in his brief on page 9, sets forth the paternalistic position of the government in its relationship with the Indians. However, the case did not turn upon the guardian

ward factor, but rather with the power of the Secretary of the Interior in his dealings with the petitioning Indian tribe.

The defendant in his pleadings did not cite any cases wherein a guardian-ward relationship was involved. He confined his pleadings to a matter of equity and made the following statement:

> This Commission has long recognized that the Indian Claims Commission Act is based on equitable principles (*Klamath & Modoc Tribe* v. *United States,* 2 Ind. Cl. Comm. 684, 688 (1954); *Osage Nation* v. *United States,* 3 Ind. Cl. Comm. 217, 270 (1954)). This being true it is a well-established principle of equity jurisprudence that he who comes into equity must do so with clean hands. Here the evidence is overwhelming and without contradiction that it was the members of the tribe (and only those members) who 'wasted and destroyed' the timber; it was the members of the petitioner tribe (and only those members) who were guilty of 'the systematic spoilation of the timber'. (Def. Findings of Fact, p. 30)

However, there are cases that have come before the Indian Claims Commission which are pertinent to the guardian-ward or fiduciary relationship of the United States Government to certain Indian tribes. These cases are now set out.

Sioux Tribe of Indians et al. v. *United States,* 2 Ind. Cl. Comm. 646, Affirmed, 146 Fed, Sup. 229, stated in regard to the guardian-ward theory advanced by the petitioner,

> . . . If the United States was in any legal sense the guardian of the Sioux with respect to the property in question, there might be some merit to appellant's argument. However, we do not find that the legal relationship of guardian and ward did exist between the United States and the Sioux. While it has often been said by this court and the Supreme Court that the general reationship of the Government to the Indians of the United States is similar to that of a guardian and

ward, it has never been held that such a general relationship amounts to a legal guardian-ward relationship in the absence of some specific language to that effect in a treaty, agreement, or act of Congress. In the absence of such specific language, the general relationship of the United States to the Indians has been that of a strong and powerful sovereign to a comparatively weak and defenseless people and because of that fact, the courts have likened the relationship to that of guardian and ward and held that doubts in treaties and agreements should be resolved in favor of the weak and defenseless party to such treaties and agreements. This issue of the existence of a legal guardian-ward relationship between the Indians and the United States absent to specific provision in a treaty or agreement spelling out such a relationship was before this court in the case of *Gila River Pima-Maricopa Indian Community, et al.* v. *United States*, 110 Fed. Supp. 776, decided May 1, 1956, which stated:

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises. It is true that the word 'fiduciary' and the expression 'guardian-ward relationship' have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is 'similar to' or 'resembles' such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. *Creek Nation* v. *United States*, 318 U.S. 629, 642.

In *Omaha Tribe of Nebraska et al.* v. *United States*, 6 Ind. Cl. Comm. 68, petitioner alleged exclusive possession of certain lands located in Nebraska. Petitioner further alleged that white settlers, miners, U. S. troops and other

persons committed various acts of trespass including unlawfully carrying away and cutting timber located on petitioner's lands; and that defendant failed to protect petitioner from said trespasses, thereby causing damage to petitioner; and petitioner further alleged said acts were contrary to treaties between the parties and further stated that said acts and omission to act were in breach of law and equity, in breach of defendant's obligation to petitioner as trustee fiduciary and guardian-ward; and in contravention of fair and honorable dealings.

The Commission first found that there was nothing in petitioner's allegations on these arguments which point to any specific language in a treaty spelling out the contractual obligation and duty which petitioner desires to impose upon defendant under Section 2(1) of the Indian Claims Commission Act of 1946.

The Commission then quoted the language of the Pima-Maricopa Indian case (140 Fed. Supp. 776) referred to above, to show there was considerable doubt of the existence of any fiduciary relationship involving legal obligations which is not founded upon some language in a treaty, statute or executive action.

The Commission stated that while the court recognized in the *Pima-Maricopa* case that a claim for breach of a fiduciary relationship

> . . . may be brought under the provisions of the Indian Claims Commission Act, it in no way intimated that the act itself created or acknowledged the existence of such fiduciary relationship as a matter of law. An examination of the legislative history of the act show that the United States is not to be considered in the role of an ordinary fiduciary whenever a legal claim is filed before the Commission, but whether the United States is or is not acting as a fiduciary must be determined under the facts in each particular case.

In *Kansas Indians* v. *The United States*, 80 Ct. Clms., 264, the court stated that where a treaty between the In-

dians and the United States contained language that the Indians are to be under the protection of the United States, such treaty did not create a fiduciary relationship but at most recognizes an existing relationship between a dependent Indian tribe and a superior political entity. However, as stated above, in the treaty in the instant case there are no words of any fiduciary relationship whatsoever. Nor is any such relationship shown by the petitioner in his evidence.

In the four cases last cited above, the issue of guardian-ward or fiduciary relationship was before the respective court and/or commission and it was necessary for the court and/or commission in these cases to decide this point to enable the court and/or commission to reach a complete decision. One case, the *Omaha Tribe of Nebraska, et al.*, v. *The United States*, did not reach a Federal Court. In each case cited above it was held that there was not a guardian-ward or fiduciary relationship, and it was further held in *Sioux Tribe of Indians of Nebraska, et al.*, v. *United States* (146 Fed. 229), and in *Omaha Tribe of Nebraska, et al.*, v. *United States* (6 Ind. Cl. Comm. 68) that the petitioner had not proven that the United States had acted in a less than fair and honorable way.

Thus in all four of the cases outlined above the issue went against the petitioners on their theory of guardian-ward or fiduciary relationship and in the two cases where the issue of fair and honorable dealings was raised, the issue was also against the petitioner.

Assuming *only* for the purpose of argument that the petitioner is not barred by reason of defendant's contention that he who comes into equity must do so with clean hands, and that it was not the petitioning tribe as such that cut and removed the timber but only individual members of the tribe and therefore the petitioning tribe was not guilty of any wrongdoing, it therefore becomes necessary to reach

an opinion on whether or not the petitioner may recover on his guardian-ward or fiduciary theory.

A careful review of the pleadings and evidence, including the cases cited herein, leads to the conclusion that the petitioner has not established a guardian-ward or fiduciary relationship. Also, it seems clear that petitioner has submitted no evidence of any kind that would establish the fact of any wrongdoing on the part of the defendant. In fact, the opposite is true, for while the defendant was not bound by the treaty in question, nor by any statute or executive action, to act in a fiduciary capacity, the defendant nevertheless remonstrated and pleaded with individual members of the tribe and with many of their chiefs to halt the cutting and removal of the timber from the reservation (Def. Ex. 64). The fact that defendant through its agents was not successful in its efforts stems not from a want of diligence on its part but rather from the fact that the Indians themselves could not apparently make up their minds as to what they wanted done (Def. Ex. 64).

The petitioner in count two of his petition states that he also has grounds for recovery under Section 2(5) of the Indian Claims Commission Act. Said clause five, for purposes of clarity and convenience, shall hereafter be referred to as the "fair and honorable clause."

In support of this allegation petitioner states in his brief,

> The United States had a duty to act in the Indians' interest. The action taken in pursuit of its own interest (even though based upon a mistaken legal premise) demonstrates that it had the means at hand to put a stop to the unauthorized dealing in the Oneida Tribe's timber. Having assumed the role and the power of a guardian, the United States should have acted as such in the circumstances above described. Its failure to do so resulted in the substantial losses to the petitioner for which the United States should respond in damages.

However, the Commission finds nothing herein that would imply a duty on the defendant United States to also act

on behalf of the Indians or that the defendant's failure to act would constitute less than fair and honorable dealings.

The petitioner on page 11 of his brief stated that the United States had deprived the petitioner tribe of power to act on its own behalf. In answer to this allegation it may be stated that the only deprivation the defendant could assert was that petitioner should not alienate any part of the fee except to the United States. The right to this limitation of alienation is so well settled that it hardly needs repetition (*Johnson* v. *McIntosh*, 8 Wheat. 574; *Wooster* v. *Georgia*, 6 Pet. 580). The Commission finds no evidence that the defendant herein attempted any other deprivation of power on the petitioner herein, other than the power to alienate as set forth in Finding 6 herein.

The Commission, after reviewing all the pleadings and evidence including the cases set forth herein bearing on the guardian-ward or fiduciary relationship and also bearing on the question of fair and honorable dealing, is of the opinion that the petitioner is not entitled to recovery on either count one or count two of its petition.

ARTHUR V. WATKINS
Chief Commissioner

We concur:

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

Concurring with an additional statement.

Scott, Associate Commissioner, concurs with the following additional statement:

In this matter, as we have found in the opinion, the spoliation and damage involved was the result of the actions of the members of the tribe, including some of their leaders.

Under all the facts and circumstances involved, I concur in the Commission's opinion and the findings of fact that the matter should be dismissed.

It is my opinion, on the other hand, in a matter arising under the Indian Claims Commission Act which would present facts of illegal trespass, spoliation, or other unauthorized acts by persons other than members of the tribe involving property on Indian reservations, that regardless of whether there is specific language in the pertinent treaty or agreement, there is an implied relationship which under certain facts might impose a duty on the part of the United States to assist the Indian tribe involved in the prevention thereof, and/or to take other appropriate action.

Because of certain statements in the opinion concerning relationships between the United States and Indian tribes, I take this means of making my position clear on this point.

T. Harold Scott
Associate Commissioner